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No. 03-95

IN THE

# Supreme Court of the United States

PENNSYLVANIA STATE POLICE,
*Petitioner*,

v.

NANCY DREW SUDERS,
*Respondent*.

**On Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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## BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF PETITIONER

The Equal Employment Advisory Council respectfully submits this brief *amicus curiae*.[1] The brief urges this Court to reverse the decision below, and thus supports the position of the petitioner, the Pennsylvania State Police. The written consents of both the petitioner and the respondent have been filed with the Clerk of this Court.

[1] Counsel for *amicus curiae* authored this brief in its entirety. No person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

## INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council ("EEAC") is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership comprises a broad segment of the business community and includes over 330 of the nation's largest private sector corporations, which collectively employ more than 20 million people throughout the United States. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members are employers subject to Title VII of the Civil Rights Act of 1964 ("Title VII"), *as amended*, 42 U.S.C. §§ 2000e *et seq.*, as well as other equal employment statutes and regulations. As employers, and as potential respondents to employment discrimination claims, EEAC members have a strong interest in the issue presented for the Court's consideration – the appropriate legal standards for determining an employer's liability for sexual harassment in the workplace under Title VII.

Thus, EEAC has an interest in, and a familiarity with, the issues and policy concerns presented to the Court in this case. Indeed, because of its experience in these matters, EEAC is well situated to brief the Court on the implications of the issues beyond the immediate concerns of the parties to the case.



## STATEMENT OF THE CASE

Petitioner Pennsylvania State Police employed respondent Nancy Drew Suders as a police communications operator ("PCO") at its McConnellsburg barracks, beginning on or about March 23, 1998. Pet. App. at 6a. In June 1998, Suders attended a formal training class on sexual harassment that was taught by the police department's Equal Employment Opportunity Officer ("EEO Officer"). *Id.* at 10a. Without mentioning any details, Suders allegedly told the EEO Officer that she might need some help. The officer gave her phone number to Suders, but Suders did not pursue the matter. *Id.*

Two months later, Suders again contacted the department's EEO Officer, this time to complain that she was being harassed and was afraid. *Id.* at 11a. The officer advised Suders to file a complaint on a standard form. *Id.* Suders resigned two days later without having filed a complaint, thereby depriving the department of the opportunity to respond to her allegations before she quit. *Id.* at 80a.

Suders sued the department for, among other things, sexual harassment and constructive discharge under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* In her lawsuit, Suders claimed that her station commander and a patrol corporal, both of whom exercised some supervisory responsibilities at the barracks, had directed obscene and offensive sexual remarks and gestures towards her throughout her employment. *Id.* at 6a. She alleged their actions created a hostile work environment that was so intolerable that she felt compelled to resign. *Id.* Suders, however, never complained to anyone at her barracks about the harassment before resigning, although she once allegedly asked the patrol corporal, without success, to stop his offensive conduct. *Id.* at 10a.

The United States District Court for the Middle District of Pennsylvania granted summary judgment in favor of the department on Suders's sexual harassment claim. *Id.* at 14a.

The district court concluded that although Suders may have experienced a hostile work environment, the department had proven as a matter of law the affirmative defense to liability for the supervisors' conduct that this Court had established in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). *Id.* at 80a. The district court did not address the merits of Suders's constructive discharge claim. *Id.* at 14a. On appeal, the Third Circuit reversed, ruling that a constructive discharge, if proven, constitutes a tangible employment action that would preclude an employer from relying on the affirmative defense to liability set forth in *Ellerth* and *Faragher*. *Id.* at 5a. Petitioner sought and was granted this Court's review of the Third Circuit's decision.

## SUMMARY OF ARGUMENT

This Court recognized an affirmative defense to employer liability under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, for sexual harassment by a supervisor under certain circumstances in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). Under *Ellerth* and *Faragher*, an employer may raise the affirmative defense, unless a supervisor took a "tangible employment action" against an employee. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807-08.

A constructive discharge is not a "tangible employment action" that would render an employer strictly liable for sexual harassment committed by a supervisor under *Ellerth* and *Faragher*. These cases require an official company act to prevent an employer from raising the affirmative defense to harassment. *Ellerth*, 524 U.S. at 762. To constitute an official company act, a supervisor must directly take a concrete action against the employee for a discriminatory reason. *Id.* In contrast, a constructive discharge is an intangible legal creation, which lacks an official stamp of company approval.



*Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 294 (2d Cir. 1999).

This Court's application of the affirmative defense in *Ellerth* strongly supports a finding of no liability where the employee did not complain about harassment prior to quitting. Moreover, a constructive discharge cannot exist as a matter of law where an employer has a well-communicated antiharassment policy, timely investigates grievances, and takes appropriate action in response to complaints. *See Lee-Crespo v. Schering-Plough Del Caribe Inc.*, __ F.3d __, 2003 WL 23095261, at *9 (1st Cir. Dec. 31, 2003). Even those courts that have concluded that a constructive discharge, if proven, would constitute a tangible employment action have focused on the reasonableness of the employee's actions in resigning and the employer's response once it found out about the harassment. *Jackson v. Arkansas Dep't of Educ.*, 272 F.3d 1020, 1026 (8th Cir. 2001), *cert. denied*, 536 U.S. 908 (2002). By using the same analysis as the affirmative defense, only under a different name, a constructive discharge claim simply duplicates the affirmative defense.

As a practical matter, reversing the Third Circuit's decision will further the important public policy this Court articulated in *Ellerth* and *Faragher* of preventing discrimination by motivating employers to develop effective antiharassment policies and grievance procedures and employees to complain promptly. *Ellerth*, 524 U.S. at 764. Both before and after the *Ellerth* and *Faragher* decisions, employers have poured substantial resources and efforts into developing well-communicated, effective antiharassment policies and grievance procedures to combat workplace sexual harassment. The unfairness of allowing an aggrieved individual's unpredictable personal response to certain conduct to control an employer's vicarious liability for harassment also will divert employers' attention away from developing such policies by weakening the value of the affirmative defense. If

an employee can make an employer strictly liable for harassment simply by quitting and claiming a constructive discharge, having a complaint procedure and remedial policy would be pointless. The decision below will jeopardize these preventive measures, and must be reversed.

## ARGUMENT

### I. A CONSTRUCTIVE DISCHARGE IS NOT A "TANGIBLE EMPLOYMENT ACTION" THAT WOULD RENDER AN EMPLOYER STRICTLY LIABLE FOR SEXUAL HARASSMENT COMMITTED BY A SUPERVISOR UNDER *ELLERTH* AND *FARAGHER*

#### A. *Ellerth* and *Faragher* Require An Official Company Act To Prevent An Employer From Raising An Affirmative Defense To Harassment

##### 1. An official company act requires a concrete action directly taken by the harassing supervisor for a discriminatory reason

This Court recognized an affirmative defense to employer liability under Title VII of the Civil Rights Act of 1964 for sexual harassment by a supervisor under certain circumstances in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). In those cases, this Court ruled that unless the supervisor's harassment results in a "tangible employment action," the defending employer may raise an affirmative defense to liability and damages for harassment by showing two things: (1) that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior" and (2) that the alleged victim "unreasonably failed to take advantage of any preventive or corrective" measures the



employer provided "or to avoid harm otherwise." *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807-08. An employer's ability to raise the affirmative defense thus depends on whether the employee experienced a tangible employment action.

Under *Ellerth* and *Faragher*, only the actions of "a supervisor with immediate (or successively higher) authority over the employee" can impose vicarious liability on an employer for harassment under Title VII. 524 U.S. at 765. This focus on supervisory action is reinforced by the Court's explanation in *Ellerth* that the affirmative defense is unavailable only "when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment." *Id.*

This Court drew its analysis directly from agency principles, which dictate when an individual has authority to act on behalf of another. In the employment context, this Court has identified

> [t]angible employment actions [as] the means by which the supervisor brings the official power of the enterprise to bear on subordinates. A tangible employment decision requires an official act of the enterprise, a company act. The decision in most cases is documented in official company records, and may be subject to review by higher level supervisors. . . . The supervisor often must obtain the imprimatur of the enterprise and use its internal processes.

*Ellerth*, 524 U.S. at 762 (citation omitted).

Under the agency principles cited by this Court in *Ellerth*, imposing strict liability on an employer is warranted only when a supervisor exercises his or her authority to make an employment decision that directly affects a subordinate in a tangible, real way. "A tangible employment action in most cases inflicts direct economic harm. As a general proposition, only a supervisor, or other person acting with the

authority of the company, can cause this sort of injury. . . . The supervisor has been empowered by the company as a distinct class of agent to make economic decisions affecting other employees under his or her control." *Id.* at 762. Holding employers strictly liable under Title VII only for concrete employment decisions, such as terminations or demotions, that are directly taken by their supervisors for a discriminatory reason faithfully adheres to these established agency principles. Thus, it follows that the Court intended the affirmative defense to be available in all other situations.

### 2. A constructive discharge lacks an official stamp of company approval

Constructive discharge claims fall into the category of employment actions that are independent of an individual's supervisory authority, and thus do not warrant imposition of strict liability against an employer. As this Court recognized in *Ellerth*, not all harassing behavior by supervisors is aided by the agency relationship. "[T]here are acts of harassment a supervisor might commit which might be the same acts a coemployee would commit, and there may be some circumstances where a supervisor's status makes little difference." *Ellerth*, 524 U.S. at 763. Unless the supervisor's actions required the use of his or her managerial authority, the employer should not be held strictly liable for the harassment.

As the Second Circuit pointed out in *Caridad*, "[c]o-workers, as well as supervisors, can cause the constructive discharge of an employee." *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 294 (2d Cir. 1999). Moreover, "unlike demotion, discharge, or similar economic sanctions, an employee's constructive discharge is not ratified or approved by the employer." *Id.* While a supervisor's actions may have contributed to a hostile work environment, the actual decision to end the employment relationship "is not an action *taken by* an employee's supervisor." *Alberter v.*



*McDonald's Corp.*, 70 F. Supp.2d 1138, 1147 (D. Nev. 1999) (emphasis added).

Instead, constructive discharge is an intangible legal fiction that the courts have created to give individuals who resign a cause of action against their employer under certain circumstances. It is not an actual, real employment decision made directly by a supervisor, such as a termination or a demotion. For these reasons, a constructive discharge therefore lacks the official stamp of company approval that is necessary to impose strict liability on an employer for harassment under Title VII. *See Ellerth*, 524 U.S. at 762.

The Seventh Circuit's artificial distinction in *Robinson v. Sappington*, 351 F.3d 317 (7th Cir. 2003), between a constructive discharge caused by supervisors and one caused by co-workers ignores *Ellerth*'s requirement for an official company act. In *Robinson*, the Seventh Circuit held that "where '*official* actions by the supervisor . . . make employment intolerable,' we believe a constructive discharge may be considered a tangible employment action." *Id.* at 336 (citation omitted).

As a preliminary matter, a hostile work environment may be the result of offensive conduct by multiple people, including both supervisors and co-workers. Therefore, the difficulty in separating out situations in which a constructive discharge is caused solely by a supervisor's harassment, as opposed to co-worker conduct, makes the Seventh Circuit's distinction unworkable.

More significantly, *Robinson*'s focus on the identity of the harasser will make employers strictly liable under Title VII *any* time a supervisor allegedly harasses an employee, an outcome this Court expressly rejected in *Ellerth* and *Faragher*. Any time an employee claims a constructive discharge based on a supervisor's harassment, the employee probably will be able to point to incidents that reflect the

supervisor's authority to manage the employee's work. For example, an employee who receives an undesirable project or unfavorable performance review likely will claim that these are "official actions" taken by the supervisor that made the work environment so intolerable that a reasonable person would have resigned, warranting strict liability on the employer under *Robinson*. This Court, however, explicitly refused to hold employers always accountable for their supervisor's actions by reserving strict liability for situations in which a supervisor has caused a "*significant* change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Ellerth*, 524 U.S. at 761 (emphasis added).

Nor did the Seventh Circuit even need to adopt this tortured interpretation of a tangible employment action in *Robinson*. In that case, a high-level manager officially reassigned the employee to an undesirable position to separate her from a harassing supervisor, describing her new position as likely to be "hell." *Robinson*, 351 F.3d at 324. Since the manager's supervisory authority over the plaintiff enabled him to make the transfer, the reassignment probably would have qualified as an official company act, thus precluding the employer from raising the affirmative defense under *Ellerth* anyway. *Robinson* therefore shows the danger of treating a constructive discharge as a tangible employment action, thereby warranting reversal of the decision below.

### B. This Court's Application Of The Affirmative Defense In *Ellerth* Strongly Supports A Finding Of No Liability Where The Employee Did Not Complain About Harassment Prior To Quitting

In fact, this Court's choice not to include constructive discharge when describing examples of tangible employment actions in *Ellerth* strongly supports a finding of no liability where an employer had effective mechanisms in place to



prevent harassment, but the employee unreasonably failed to take advantage of them. *Ellerth* itself was a constructive discharge case. The district court dismissed Ellerth's constructive discharge claim because it said she "consciously chose not to use Burlington's grievance procedure" without any evidence that her employer would have ignored her complaint. *Ellerth v. Burlington Indus., Inc.*, 912 F. Supp. 1101, 1124 (N.D. Ill.), *rev'd*, 123 F.3d 490 (7th Cir. 1996), *aff'd*, 524 U.S. 742 (1998). The court reasoned that "[p]lainly, when an employer provides an avenue for relief from sexual harassment and an employee chooses to forego that avenue, she cannot be heard to complain that she was constructively discharged by virtue of the harassment." *Id.*

The case thus presented this Court with the opportunity to treat a constructive discharge as a tangible employment action. 524 U.S. at 761. Yet, in describing the tangible employment actions that Ellerth possibly could raise, this Court identified only a denial of a raise or a promotion, and not a constructive discharge. *Id.* The Court's decision to exclude her constructive discharge claim therefore supports the conclusion that such a claim is unavailable when an employee has an effective grievance procedure accessible to her, but decides not to use it without any evidence that her complaint would be futile. *See* Sara Kagay, *Note: Applying the Ellerth Defense to Constructive Discharge: An Affirmative Answer*, 85 Iowa L. Rev. 1035, 1057-58 (Mar. 2000). In fact, this Court specifically noted that "Ellerth has not alleged she suffered a tangible employment action at the hands of [her supervisor]." *Ellerth*, 524 U.S. at 766.

Other courts likewise have refused to make employers strictly liable for workplace harassment based on this Court's decision to exclude constructive discharge when describing tangible employment actions, despite its awareness of Ellerth's claim. *See, e.g., Caridad*, 191 F.3d at 295; *Powell v. Morris*, 37 F. Supp.2d 1011, 1019 (S.D. Ohio 1999).

### C. A Constructive Discharge Cannot Exist Where An Employer Has A Well-Communicated Antiharassment Policy, Timely Investigates Grievances, And Takes Appropriate Action In Response

An employee who unreasonably fails to follow her employer's internal grievance procedure for reporting sexual harassment or to acknowledge that her employer has resolved the situation before quitting cannot establish a constructive discharge claim. To establish a constructive discharge, a plaintiff must show "that [her] working conditions were 'so intolerable that a reasonable person in her position would have been compelled to resign.'" *Poole v. Country Club of Columbus, Inc.*, 129 F.3d 551, 553 (11th Cir. 1997) (citations omitted). In a work environment that includes a well-communicated antiharassment policy, a simple complaint procedure that is readily accessible to employees, and prompt, effective relief to remedy harassment, a reasonable person would not feel forced to resign.

In other words, the availability of a complaint procedure that satisfies the affirmative defense also effectively precludes a constructive discharge claim, because it provides a reasonable alternative to resignation. An employee who rejects that alternative in favor of quitting is not acting reasonably. The Eleventh Circuit held in *Kilgore v. Thompson & Brock Management, Inc.*, 93 F.3d 752 (11th Cir. 1996), that three employees could not establish a constructive discharge claim where they did not give their employer enough time to remedy the situation before they quit. *Id.* at 754. Likewise, the Eighth Circuit has held that "[i]f an employee quits without giving her employer a reasonable chance to work out a problem, then she has not been constructively discharged." *Howard v. Burns Bros.*, 149 F.3d 835, 842 (8th Cir. 1998) (citation and internal quotation omitted). Moreover, management's swift action to investi-



gate and promptly resolve a complaint of harassment significantly undercuts an employee's claim that she was forced to leave. *Lee-Crespo v. Schering-Plough Del Caribe, Inc.*, __ F.3d. __, 2003 WL 23095261, at *9 (1st Cir. Dec. 31, 2003).

Suders's failure promptly to complain about harassment thus bars her constructive discharge claim as a matter of law.

### D. A Constructive Discharge Claim Simply Duplicates The Affirmative Defense Analysis, Only Under A Different Name

Those courts that have concluded that a constructive discharge could constitute a tangible employment action have focused on the reasonableness of the employee's actions in resigning and the employer's response once it found out about the harassment. By employing the same analysis as the affirmative defense, only under a different name, these courts have proven that the elements of a constructive discharge and an *Ellerth* defense are duplicative. In *Jackson v. Arkansas Department of Education*, 272 F.3d 1020, 1026 (8th Cir. 2001), *cert. denied*, 536 U.S. 908 (2002), for example, the Eighth Circuit summarily ruled that a proven constructive discharge would constitute a tangible employment action that would prevent the employer from raising the affirmative defense. This ruling is unhelpful, however, because the court was silent on its rationale.

Nevertheless, the *Jackson* court's incorporation of the affirmative defense into the plaintiff's constructive discharge claim is instructive. The court ultimately rejected the plaintiff's constructive discharge claim after concluding she had unreasonably failed to notify her employer about the harassment until nine months after it had started, thereby depriving it of the opportunity to correct the alleged problem. *Id.* at 1027. In addition, the court found Jackson's employer had responded reasonably to her eventual complaint by separating the two workers, reimbursing the plaintiff for sick

leave she had taken because of the harassment, following up to see if she had any further problems, and ultimately firing her harasser. *Id.*

By conflating the requirements for the affirmative defense and a constructive discharge claim, the Eighth Circuit showed that the constructive discharge analysis actually is duplicative in harassment cases in which an employer has effective antiharassment policies and procedures in place, and the employee fails to complain promptly about harassment. In that case, the employee has not acted reasonably, and therefore cannot establish a viable constructive discharge claim. At the same time, the employer can rely on the affirmative defense by showing it acted reasonably to prevent and promptly correct the harassment, and that the employee unreasonably failed to complain. *See Ellerth*, 524 U.S. at 765. In contrast, an employer that lacks such policies would be liable for harassment, since it could neither prove its affirmative defense nor refute a constructive discharge claim. Thus, the same evidence that bears on the merits of the employee's constructive discharge claim will determine whether the employer may use the affirmative defense. Yet, requiring this dual analysis to reach the same outcome makes no sense.

One commentator complained about the unnecessary confusion a constructive discharge claim creates in harassment cases:

> Rather than attempting to bolster the reasonableness elements required in constructive discharge to assure that a plaintiff does not evade the Ellerth defense standards, courts should just apply that defense in appropriate cases. Where the case is a traditional hostile work environment case with the addition of a plaintiff's resignation, an employer should be able to assert a defense. . . . Allowing the employer to assert an affirmative defense would lead to more consistent, uniform



> standards. Both employers and employees would have a better idea of what is required, and constructive discharge would fit more neatly into the employment scheme the Court created in Ellerth and Faragher.

Kagay, at 1061. After all, the need to develop "a uniform and predictable standard" of an employer's vicarious liability for a supervisor's harassment initially motivated this Court to articulate the affirmative defense in *Ellerth*. 524 U.S. at 754.

By unnecessarily forcing a court to evaluate the same evidence twice, the Third and Eighth Circuit's treatment of a constructive discharge as a tangible employment action, which if proved, would preclude the employer's affirmative defense must be reversed.

## II. REVERSING THE THIRD CIRCUIT'S DECISION WILL FURTHER THE IMPORTANT PUBLIC POLICY THIS COURT ARTICULATED IN *ELLERTH* AND *FARAGHER* OF PREVENTING HARASSMENT BY MOTIVATING EMPLOYERS TO DEVELOP EFFECTIVE ANTIHARASSMENT POLICIES AND GRIEVANCE PROCEDURES, AND EMPLOYEES TO COMPLAIN PROMPTLY

### A. The Affirmative Defense Is Critical To Furthering Title VII's Primary Purpose Of Preventing Discrimination

#### 1. By prohibiting sexual harassment that exceeds a certain threshold, Title VII encourages early detection and remedies

Title VII, by prohibiting sexual harassment that exceeds a certain threshold of severity, creates a strong incentive to employers to detect and respond to potential problems early, before they escalate to the level of unlawful conduct. 42 U.S.C. § 2000e-2. This Court described the primary objective of Title VII and the remedies available under it as

encouraging employers "to self-examine and to self-evaluate their employment practices" in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). Although this Court interpreted Title VII to prohibit sexual harassment as a form of sex discrimination in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986), it explicitly refused to hold employers always automatically liable for sexual harassment by their supervisors. *Id.* at 72. Instead, the Court said agency principles should guide employers' liability for their supervisors' actions. *Id.*

Nor did the *Meritor* court conclude that all offensive behavior in the workplace is unlawful. Instead, the Court established a threshold as to the degree of harassment that constitutes unlawful discrimination. "For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Id.* at 67 (citation omitted). In *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), the Court reaffirmed that not all offensive conduct is actionable. "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment – an environment that a reasonable person would find hostile or abusive – is beyond Title VII's purview." *Id.* at 21. By holding employers liable under Title VII only when harassing behavior surpasses a certain threshold, this Court gave employers an incentive to detect and respond to harassing conduct early on before it reaches that level.

**2. This Court's recognition of an affirmative defense to sexual harassment claims under certain circumstances promotes Title VII's goal of preventing discrimination**

Court decisions that have reduced or eliminated an employer's liability for harassment based on its internal efforts to detect and respond to harassment have furthered Title VII's goal of preventing discrimination by encouraging



employers to develop well-communicated, express policies banning sexual harassment in the workplace and to respond promptly to harassment complaints. In particular, this Court's recognition of an affirmative defense to a harassment claim involving a supervisor under certain circumstances in *Ellerth* and *Faragher* exemplifies this incentive. In *Ellerth*, the Court described how the affirmative defense accomplishes Title VII's "'primary objective'" of avoiding harm, *Faragher*, 524 U.S. at 806, by encouraging employers to develop, and individuals to use, effective complaint procedures.

> Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms. Were employer liability to depend in part on an employer's effort to create such procedures, it would effect Congress' intention to promote conciliation rather than litigation in the Title VII context, and the EEOC's policy of encouraging the development of grievance procedures. To the extent limiting employer liability could encourage employees to report harassing conduct before it becomes severe or pervasive, it would also serve Title VII's deterrent purpose. As we have observed, Title VII borrows from tort law the avoidable consequences doctrine, and the considerations which animate that doctrine would also support the limitation of employer liability in certain circumstances.

*Ellerth*, 524 U.S. at 764 (citations omitted).

This Court went on to explain in *Faragher* that holding an individual to a reasonable care standard stems from the general theory of damages, which requires a victim to use reasonable means to avoid or minimize harm. The underlying premise of the affirmative defense is that an employer should not be responsible for harm the individual could have avoided, once given the means to do so. "If the victim could have avoided harm, no liability should be found against the employer who had taken reasonable care, and if damages

could reasonably have been mitigated no award against a liable employer should reward a plaintiff for what her own efforts could have avoided." 524 U.S. at 807.[2]

### B. Allowing A Constructive Discharge Claim To Preclude The Affirmative Defense Will Undermine Employer Efforts To Create Effective Internal Antiharassment Policies And Procedures

#### 1. Employers have responded to the incentive created by the affirmative defense by developing effective antiharassment policies and procedures

The Court's projection in *Ellerth* and *Faragher* that rejecting strict liability for employers under Title VII for workplace harassment would encourage employers to develop effective procedures to detect and respond to workplace harassment has proven true. A 2001 workplace survey of over 200 human resource executives conducted by a national law firm found that 82% of the respondents provided sexual harassment prevention training for their supervisors, a sharp increase from the 34% that provided this type of training in 1995. The rise in training corresponds to a significant decline in the number of sexual harassment complaints being filed in the workplace. Sixty percent of the respondents reported handling an internal sexual harassment complaint in the past year, down from 92% of the respondents in 1995. Most of the respondents worked for companies with over 100 employees. *See* 2001 Jackson Lewis Annual Workplace

[2] Several courts of appeals have upheld the availability of the affirmative defense based on the unreasonableness of the employee's inaction in response to the alleged harassment. *See, e.g., Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 267 (4th Cir. 2001); *Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290, 1301-02 (11th Cir. 2000).



Issues Survey, *available at* http://www.jacksonlewis.com/publications/surveys/workplace/ 2001/default.htm.

A separate poll of 232 human resources managers in 2000 found that 97% of the companies represented had a formal policy against sexual harassment. Moreover, these companies were continually striving to improve their policies. Of them, 83% had updated their policy within the last two years, one third having revised the policy within the last six months. 75% of the companies had updated their procedures on reporting and investigating sexual harassment complaints within the past two years. Almost 30% of the companies had made such revisions within the last 6 months. In addition, 74% of the companies provided sexual harassment training for their employees, who spent an average of 3-4 hours per year attending this type of training. Institute of Management and Administration (IOMA), "Sexual Harassment Survey: Vital Statistics," *Human Resource Department Management Report* (Jan. 2002).

The experiences of EEAC's members also demonstrate the value of the affirmative defense in preventing harassment. These companies are committed to maintaining workplaces that are free from discrimination, including sexual harassment. They long ago recognized that workplace discrimination, including sexual harassment, not only is against the law, but also is bad business, causing employees to be less productive, less satisfied with their jobs, and ultimately less likely to stay with the company. The existence of the affirmative defense acknowledges these concerns.

Accordingly, U.S. companies such as EEAC's members have expended substantial resources and significant efforts to combat workplace sexual harassment. They have adopted policies expressing their commitment to the right of all employees to be free from sexual harassment in the workplace and categorically forbidding supervisors and employees from engaging in sexually harassing conduct. They have

communicated those policies to all employees at new employee orientation and other appropriate opportunities. They have publicized those policies in employee manuals and hand-delivered and posted notices. They have conducted frequent and repeated seminars, training sessions, and briefings to teach supervisors and employees to recognize and halt harassment in the workplace.

In addition, these companies have implemented formal antiharassment procedures that encourage witnesses as well as victims to report sexual harassment to management. These procedures call for rapid, thorough investigation and prompt, effective remedial action where warranted, including discipline and, where appropriate, discharge of offenders. Moreover, these companies have taken steps to ensure that these procedures are accessible to employees and that employees are aware of both their purpose and their effect.

The success of companies' efforts to reduce workplace harassment is evident. Since the 1998 *Ellerth* and *Faragher* decisions, the number of discrimination charges alleging sexual harassment that have been filed with the Equal Employment Opportunity Commission (EEOC) or state and local fair employment practices agencies has declined almost 10%. According to the EEOC, the number of Title VII charges alleging sexual harassment dropped from a 10-year high of 15,889 in fiscal year 1997, to 14,396 in fiscal year 2002.[3] These figures thus demonstrate the effectiveness of the affirmative defense in furthering Title VII's goal of preventing discrimination.

[3] *See* Equal Employment Opportunity Commission, "Sexual Harassment Charges EEOC and FEPAs Combined: FY 1992 – FY 2002," *available on the EEOC's web site at* http://www.eeoc. gov/stats/harass.html.



**2. The decision below jeopardizes continued employer efforts to prevent discrimination**

Allowing employees to proceed with constructive discharge claims, even though their employers had effective antiharassment policies and grievance procedures in place to deal with harassment complaints, would undermine seriously the incentive the affirmative defense provides for employers to create internal mechanisms to address sexual harassment. The decision below would jeopardize the very existence and growth of these important antiharassment policies and procedures by diminishing their practical value in helping a company defend against a harassment claim. Allowing employees to make their employers strictly liable for harassment by simply quitting without reporting the harassment or single-handedly rejecting an effective resolution would make having a complaint procedure and remedial policy pointless. "[I]f an employee could convert a hostile work environment claim into a constructive discharge claim simply by resigning without first seeking redress from the employer, then the *Ellerth* defense would ring hollow." *Scott v. Ameritex Yarn*, 72 F. Supp.2d 587, 595 (D.S.C. 1999); *see also EEOC v. Barton Protective Servs., Inc.*, 47 F. Supp.2d 57, 60 (D.D.C. 1999) ("[a]ssigning the labels of 'constructive discharge' and 'tangible employment action' to [plaintiff's resignation] . . . would make nonsense of the *Burlington* affirmative defense").

This prospect is particularly troubling because quitting robs the employer of the opportunity to address the harassment, which further undercuts Title VII's goal of avoiding discrimination. By quitting, a victim of harassment knowingly allows the harasser to continue behaving objectionably. In essence, the decision below "would allow a constructive-discharge claiming employee to procedurally bypass her employer's grievance procedure and deprive it of the *Ellerth/Faragher* affirmative defense. That would simply

moot the employer's preventive and corrective efforts, and gut *Ellerth/Faragher*'s goal of encouraging sensible grievance procedures." *Jones v. USA Petroleum Corp.*, 20 F. Supp.2d 1379, 1384 (S.D. Ga. 1998).

The Third Circuit's decision thus significantly reduces the incentive for employers to develop effective complaint procedures. The knowledge that even the most effective complaint procedure will not protect them from liability if an employee suddenly quits instead of alerting management to harassment significantly lessens the benefit of developing such procedures. In the end, employees would control when, if ever, the affirmative defense would be available to their employers. Treating quitting as a tangible employment action would represent a return to strict employer liability for workplace harassment, a result this Court explicitly rejected in *Faragher* and *Ellerth*.

The law thus supports holding employers strictly liable for sexual harassment under Title VII only when a subordinate suffers a tangible employment action at the hands of his or her harassing supervisor because of a gender bias. Imposing liability only under these circumstances will continue to encourage employers to detect and remedy situations before they reach this level, which promotes Title VII's goal of preventing harassment.

### C. To Base An Employer's Vicarious Liability For Harassment On An Aggrieved Individual's Unpredictable Personal Response To Certain Conduct Would Be Unfair

Employers cannot even predict, much less control, how a particular individual will respond to behavior he or she encounters. To make employer liability depend on this type of uncertainty, rather than actions taken by supervisors that are within its control, would be unfair.



Allowing a plaintiff to control when her employer would be strictly liable for harassment would be an anomaly. In rejecting a plaintiff's voluntary request for a transfer to distance herself from her harasser as a tangible employment action, the court in *Sconce v. Tandy Corp.*, 9 F. Supp.2d 773 (W.D. Ky. 1998), explained that it

> [could] not find any authority or logic which supports such a concept that a self-imposed job detriment should support strict liability. . . . If a plaintiff can refuse the sexual advances and then self-impose a job detriment, the circumstances stray quite far from anyone's ability to connect that detriment to the employer as a matter of strict liability. The degree of the *supervisor's* conduct determines the employer's liability.

*Id.* at 776.

Applying the same reasoning, the court in *Dunegan v. City of Council Grove, Kansas Water Department*, 77 F. Supp.2d 1192 (D. Kan. 1999), also refused to let the plaintiff control when the affirmative defense was available. In that case, the court held the plaintiff's unilateral decision to take time off after she complained about harassing conduct in the workplace did not constitute a tangible employment action. *Id.* at 1199-1200. Her decision did not refer to "significant changes in employment status . . . in which the alleged harasser *directly* fired, demoted or reassigned the victim of harassment . . . ." *Id.* at 1200 (emphasis added).

Likewise, an employee's personal reaction to alleged harassment and decision to apply for long term disability benefits should not deprive her employer of the chance to raise the affirmative defense. In *Desmarteau v. City of Wichita*, 64 F. Supp.2d 1067 (D. Kan. 1999), the court rejected disability retirement as a tangible employment action under *Ellerth* and *Faragher*. The plaintiff claimed she was forced to retire because her supervisor's harassment caused her severe emotional distress. The court, however, said this

Court's "focus on the tangible actions of the supervisor would logically exclude actions which are only 'constructively' attributed to [her supervisor], and would exclude employment consequences arising from a plaintiff's particular reaction to a hostile working environment." *Id.* at 1079. Giving employees virtually complete control over employer liability for sexual harassment would render even the most comprehensive and effective antiharassment policy and grievance procedure irrelevant, a result that surely frustrates Title VII.

### D. The Decision Below Would Severely Prejudice Employers By Subjecting Them To Significantly More Discrimination Claims And Weakening Their Defense

The Third Circuit's decision significantly increases the pool of potential claimants who may seek to hold their employers strictly liable for workplace harassment, and thus the number of claims to which employers must respond. On average, over 1.8 million workers in the United States quit their private sector jobs *each month* in 2003.[4] This figure does not even include the farming industry, which traditionally has a higher turnover rate. *Id.*

The decision below makes each ostensibly voluntary separation a potential subject of a discrimination charge and/or lawsuit that may result in automatic liability for the employer. Each time an employee quits, he or she subsequently may claim that the resignation really was a constructive discharge. Under the decision below, linking the resignation to some harassment by a supervisor may completely preclude the employer from relying on the affirmative defense, thereby allowing the former employee to

[4] Employment Policy Foundation tabulation of Bureau of Labor Statistics data from the Job Openings and Labor Turnover Survey (2003) (data *available at* http://data.bls.gov/labjava/outside.jsp?survey=jt).



recover up to $300,000 in compensatory and punitive damages for a successful claim. 42 U.S.C. § 1981a. Unless this Court reverses the decision below, employers will be forced to defend against significantly more harassment complaints seeking to impose strict liability. While these employers ultimately may succeed in refuting the constructive discharge claim, they still must undergo a lengthy and expensive process to defend against each discrimination charge.

The prospect that employees who quit their jobs will try to hold employers strictly liable for workplace harassment also leaves employers with a difficult choice to make. Employers may want to investigate the working conditions of some or all workers who quit to determine whether harassment forced the person to resign to gauge their vulnerability to a finding of strict liability. The fixed budgets on which many human resources departments operate, however, means that these investigations likely will draw resources away from other programs that attempt to reduce the occurrence of harassment. This shift, however, may weaken an employer's ability to prove the affirmative defense, should it be available. This Court must reverse the decision below to avoid subjecting employers to an increased number of harassment claims while curtailing their ability to defend against them.

## CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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